A **MOHD SHAMSUL ABDUL AZIZ v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MOHD ZAWAWI SALLEH JCA
ABANG ISKANDAR JCA
B [CRIMINAL APPEALS NO: B-05-76-03-2014 & B-05-77-03-2014]
3 DECEMBER 2015

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Deceased died of single stab wound – Absence of defensive wounds – Whether there was intention to kill* C *– Whether injury inflicted would most probably cause death – Whether charge of murder sustainable – Whether conviction for murder safe*

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Common intention – Whether established – Whether there was direct or circumstantial evidence to link* D *second appellant to act of killing – Whether second appellant knew that first appellant carried a knife – Whether second appellant to be acquitted and discharged – Penal Code, s. 34*

The first appellant and the second appellant were both charged under s. 302 of the Penal Code ('the first charge') and s. 395/397 of the same Code. On E 27 February 2010, the deceased had just come home from the Surau when he was approached by a Malay couple ('the appellants'). According to PW12, the wife of the deceased, the second appellant had asked for a pencil to write down the phone number of the owner of the house next door to the deceased's. The second appellant had then followed the deceased into the house and later followed PW12 into her bedroom without being invited to F do so. It was alleged that the second appellant had then taken the jewelleries belonging to PW12 without her consent. At about the same time, the first appellant had also entered the house and was seen standing behind the first appellant with a knife. PW12 then saw blood oozing out from the deceased's abdomen. Both appellants then fled the scene. The deceased was pronounced G dead a day after the incident due to stab wound to the abdomen. Ensuing investigations led to the arrest of the appellants. The High Court Judge found the appellants guilty and convicted them on both offences. The appellants were sentenced to death for the first charge. As for the second charge, the first appellant was sentenced to eight years of imprisonment as well as three H strokes of whipping. The second appellant was also sentenced to eight years of imprisonment. The appellants appealed against the decision of the High Court Judge in relation to the first charge only, namely for murder. The first appellant raised the issue that there was only one single stab inflicted on the deceased and that, as there was no defensive wound suffered by the deceased, I it was contended that there was no intention on the part of the first appellant to kill the deceased. As for the second appellant, it was contended that the

issue of common intention under s. 34 of the Penal Code was not applicable to the factual circumstances of this case. It was also submitted that there was no evidence that the act of stabbing was pre-planned. The second appellant did not see the act of stabbing done by the first appellant and there was also no evidence that the second appellant knew that the first appellant was carrying a knife with him.

Held (dismissing first appellant's appeal; allowing second appellant's appeal)

Per Abang Iskandar JCA delivering the judgment of the court:

(1) The injury inflicted by the first appellant on the deceased, although only a single stab, was the most probable cause of the death of the deceased, as indeed it had turned out to be. This was amply demonstrated in the testimony of the pathologist, SP9. In such case, it was murder, an offence under s. 302 of the Penal Code, as opposed to a lesser offence of culpable homicide not amounting to murder. This was in fact the conclusion of the trial judge. The trial judge did not err in so concluding and in sustaining the charge of murder against the first appellant. This court affirmed the conviction for murder against the appellant. (para 18)

(2) The prosecution had failed to adduce direct evidence nor circumstantial evidence that could be used as a basis to link the second appellant to the act of killing the deceased. Although common intention may be formed immediately before the commission of the impugned act, there was no evidence led by the prosecution from which such an inference may be concluded against the second appellant to the effect that she, together with the first appellant, had committed the offence of murder in pursuance of a common intention of them both. There was no evidence to show what act she had done in the direction leading to the murder of the deceased. Further, the second appellant had no knowledge that the first appellant had carried a knife with him. Thus, in the absence of a common intention to commit murder, the second appellant was not guilty of the murder charge under s. 302 of the Penal Code. The second appellant was therefore acquitted and discharged of the murder charge against her. (paras 26, 28 & 29)

Bahasa Malaysia *Headnotes*

Perayu pertama dan perayu kedua telah dipertuduh di bawah s. 302 Kanun Keseksaan ('pertuduhan pertama') dan di bawah s. 395/397 Kanun yang sama. Pada 27 Februari 2010, si mati telah kembali ke rumahnya dari Surau apabila dia didatangi dua orang berbangsa Melayu ('perayu-perayu'). Menurut PW12, isteri kepada si mati, perayu kedua telah meminta sebatang pensil bagi menulis nombor telefon pemilik rumah bersebelahan dengan rumah si mati. Perayu kedua kemudian telah mengikuti si mati ke dalam

rumah dan kemudiannya mengikut PW12 ke dalam bilik tidurnya tanpa dijemput. Adalah didakwa bahawa perayu kedua telah mengambil barang kemas milik PW12 tanpa izinnya. Pada waktu yang sama, perayu pertama telah memasuki rumah si mati dan dilihat berdiri di belakang si mati dengan sebilah pisau. PW12 kemudiannya melihat darah mengalir keluar dari perut si mati. Kedua-dua perayu melarikan diri. Si mati disahkan meninggal dunia sehari selepas kejadian akibat luka tikaman di bahagian abdomen. Siasatan berikutnya membawa kepada penangkapan kedua-dua perayu. Hakim Mahkamah Tinggi mendapati bahawa perayu-perayu bersalah dan mensabitkan mereka dengan kedua-dua kesalahan. Perayu-perayu dihukum mati untuk pertuduhan pertama. Berkenaan pertuduhan kedua, perayu pertama dijatuhkan hukuman lapan tahun penjara serta tiga sebatan. Perayu kedua juga dijatuhkan hukuman lapan tahun penjara. Perayu-perayu merayu terhadap keputusan Hakim Mahkamah Tinggi berhubungan dengan pertuduhan pertama sahaja, iaitu kesalahan membunuh. Perayu pertama membangkitkan isu bahawa terdapat hanya satu tikaman tunggal yang dikenakan ke atas si mati dan tiada luka pertahanan dialami oleh si mati, oleh itu, dihujahkan bahawa perayu pertama tidak berniat untuk membunuh si mati. Bagi perayu kedua pula, dihujahkan bahawa isu niat bersama di bawah s. 34 Kanun Keseksaan tidak terpakai kepada keadaan fakta kes ini. Dihujahkan juga bahawa tiada keterangan bahawa tindakan menikam telah dirancang terlebih dahulu. Perayu kedua tidak melihat tindakan menikam yang dibuat oleh perayu pertama dan tiada keterangan bahawa perayu kedua mengetahui bahawa perayu pertama telah membawa pisau bersama-samanya.

Diputuskan (menolak rayuan perayu pertama; membenarkan rayuan perayu kedua)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Kecederaan yang dikenakan oleh perayu pertama ke atas si mati, walaupun hanya satu tikaman, adalah punca paling mungkin bagi kematian si mati, dan itulah yang terjadi. Ini telah jelas ditunjukkan dalam testimoni pakar patologi, SP9. Dalam kes sebegitu, ia adalah pembunuhan, satu kesalahan di bawah s. 302 Kanun Keseksaan, dan bukannya kesalahan yang lebih kecil iaitu homisid salah yang tidak terjumlah kepada pembunuhan. Ini sebenarnya kesimpulan hakim bicara. Hakim bicara tidak terkhilaf dalam mencapai keputusan itu dan dalam mengekalkan pertuduhan membunuh terhadap perayu pertama. Mahkamah ini mengesahkan sabitan atas kesalahan bunuh terhadap perayu.

(2) Pihak pendakwaan telah gagal mengemukakan keterangan langsung atau keterangan mengikut keadaan yang boleh digunakan sebagai asas untuk menghubungkan perayu kedua dengan tindakan membunuh si mati. Walaupun niat bersama boleh dibentuk sebelum sesuatu perbuatan yang

menjadi persoalan terjadi, tiada keterangan yang dikemukakan oleh pihak pendakwaan di mana inferens sebegitu boleh disimpulkan terhadap perayu kedua yang menunjukkan perayu kedua, bersama dengan perayu pertama, telah melakukan kesalahan membunuh menurut niat bersama mereka berdua. Tiada keterangan yang menunjukkan apa-apa tindakan telah dilakukan oleh perayu kedua yang membawa kepada pembunuhan si mati. Tambahan, perayu kedua tidak mempunyai pengetahuan bahawa perayu pertama telah membawa sebilah pisau dengannya. Dengan itu, dalam ketiadaan niat bersama untuk melakukan pembunuhan, perayu kedua tidak bersalah terhadap pertuduhan membunuh di bawah s. 302 Kanun Keseksaan. Perayu kedua dengan itu dilepaskan dan dibebaskan daripada pertuduhan membunuh yang telah dikenakan ke atasnya.

Case(s) referred to:
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Khairul Edam Adam & Anor v. PP [1999] 2 SLR 57 ***(refd)***
Mahboob Shah v. Emperor AIR [1945] PC 118 ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(foll)***

Legislation referred to:
Penal Code, ss. 34, 302, 395, 397

Other source(s) referred to:
Ratanlal and Dhirajlal, *The Indian Penal Code*, 34th edn, p 51

For the appellants - KA Ramu, M/s KA Ramu Vasanthi & Assocs
For the respondent - Nurshafini Mustafha; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45B-67-2010 (overruled in part)]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar JCA:

Introduction

[1] Mohd Shamsul bin Abdul Aziz @ Abdul Azis ("the first appellant") and his sister, Tuti Adayu binti Abdul Aziz @ Abdul Azis ("the second appellant") were both initially charged under s. 302 of the Penal Code ("the first charge") and s. 395/397 of the same Code ("the second charge").

[2] The learned High Court Judge found both of them guilty and convicted them with both offences on 26 February 2014. Both of them were sentenced to death for the first charge. As for the second charge, the first appellant was sentenced to eight years of imprisonment as well as three strokes of

whipping. The second appellant was also sentenced to eight years of imprisonment but she was not sentenced to any order of whipping in relation to the robbery charge.

[3] Both appellants had since appealed against the decision of the learned High Court Judge to the Court of Appeal in relation to the first charge only, namely for murder. We sighted no notice of appeal having been filed in respect of the second charge, namely the robbery charge.

[4] The charge for under s. 302 of the Penal Code reads as follows:

> Bahawa kamu bersama-sama pada 27 Februari 2010 jam lebih kurang 8.15 malam, di No. 35, Jalan Kembojasari 12, Bandar Sg. Buaya, Bukit Sentosa, di dalam Daerah Hulu Selangor, di dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Nen bin Ariffin (No. K/P: 351208-02-5069), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama dengan seksyen 34 Kanun yang sama.

The Prosecution's Case

[5] On 27 February 2010, around 8.15pm, according to Siti Aminah bt Lateh ("PW12"), her husband, Nen bin Ariffin ("the deceased"), had just came home from the "surau" when he was approached by a Malay couple, who were later identified as the appellants. The appellants had asked about renting a house. PW12 who, at that time had just finished performing her prayers, went to the living hall of her house to see what was going on at the veranda of the house.

[6] According to PW12, the deceased told them that there was an empty house next to their house which could be available for renting. The deceased had given them the phone number to contact the owner. The second appellant had then asked from the deceased, a pencil to write down the phone number. The second appellant then followed him into the house and later she followed PW12 into her bedroom without being invited to do so. It was then alleged that while inside the bedroom, the second appellant had relieved PW12 of the jewelleries that the latter was wearing without her consent, namely two necklaces and two bracelets.

[7] At about the same time, the first appellant had also entered into the house. In the living hall, PW12 saw the first appellant standing behind the deceased by holding a knife in his hand. Not long after that, PW12 saw blood oozing out apparently from the deceased's abdomen. Both appellants then left the house and fled in a Proton Saga car that they had driven in when they came to PW12's house earlier.

[8] The deceased was pronounced dead a day after the incident ie, on 28 February 2010, due to stab wound to the abdomen. The cause of death as per the post-mortem report prepared by the pathologist (exh. P13) was "Stab wound of the abdomen". A

[9] After the incident, PW12 found a handphone believed to belong to the second appellant in her bedroom. The ensuing investigations had led to the arrest of both the appellants. They were subsequently charged for the offences as alluded to above. B

The Appeals

[10] Both appeals were heard by us together on 7 January 2015. The defence counsel, when submitting for the first appellant before us, had raised the issue that there was only one single stab inflicted on the deceased. As there was no defensive wound suffered by the deceased, it was contended that there was no intention on the part of the first appellant to kill the deceased. C

[11] Learned counsel Mr KA Ramu, in the course of his submissions had argued that the case that was cited and relied on by the learned trial judge, namely the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLRA 92 must be distinguished from this case, on account of their dissimilar factual matrix. It was stressed before us that the deceased in *Duis Akim*'s case (*supra*) had suffered 12 stabs in total, over the neck and upper back regions of his body. Likewise in the case of *Tan Buck Tee v. PP* [1961] 1 LNS 130; [1961] 27 MLJ 176, there were five appalling wounds found on the deceased. Whereas, according to learned counsel, in this instant appeal, there was only a single stab inflicted on the deceased person. Premised on that contention, learned counsel then referred us to the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 as an authority for the proposition that an inference of the intention to cause death can be drawn when the person killed was struck with more than one blow. Therefore, the learned High Court Judge had erred when he came to the conclusion that the charge for murder as preferred against the first appellant was made out. D E F G

[12] The passage which learned counsel for the first appellant had sought to rely on in *Tham Kai Yau*'s case (*supra*) is now reproduced below:

> The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. H

[13] To our mind, that passage does not suggest that in order for an inference be made that there was an intention to commit murder, there must be more than one blow. What that passage conveys is that where there have been evidence of more than one blow having been employed by an accused I

person on the victim, the court will become more ready to come to the conclusion on the intention of the accused person. The crux of the passage indeed resides in the opening sentence that goes: 'The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death.'

[14] Reverting back to case before us, the learned trial judge had said that the injury was inflicted by force. This can be seen in his grounds of judgement which we now reproduce below:

> Di dalam kes ini saya tidak meragui dapatan oleh Patologis (SP9) dan laporan beliau Ekshibit P13, seterusnya penemuan beliau mengenai sebab-sebab kematian iaitu "Stab wound of the abdomen".

[15] In fact, the learned trial judge was aware of the concern that was raised by learned counsel in that there was only one stab wound that was inflicted on the deceased. He did address his mind to that issue. This is what he had said:

> Walaupun hanya satu tikaman yang dilakukan, akan tetapi tikaman itu adalah secara "force" sehingga mencederakan organ-organ penting si mati dan mengakibatkan kehilangan banyak darah seterusnya menyebabkan si mati meninggal dunia. Jelas di sini wujud *mens rea* "T" untuk membunuh si mati yang boleh dianggapkan ada pada "T". [See page 37, paragraph 49 of His Lordship's Grounds of Judgment].

[16] From the above quoted passage from the decision of the learned trial judge, it was apparent to us that what the learned trial judge said had been that although there was only one injury that was inflicted on the deceased by the first appellant, it was so inflicted at a critical part of the deceased's anatomy, namely at his abdomen area thereby causing injuries to the internal organs of the deceased thereby causing much of loss of blood, leading to the death of the deceased. Another feature of that stab wound, as observed by the pathologist, was that it was inflicted with much force. Considered together, such injury so inflicted was most probable than it was likely to cause death. It was in that context that *Tham Kai Yau*'s case (*supra*) ought to be viewed and applied in this case. We reproduce here what the learned apex justices in that case had stated, through the speech of the learned justice Raja Azlan Shah FCJ (as he then was):

> … Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is **likely** to result, it is culpable homicide. If it is the **most probable** result, it is murder. (emphasis added)

[17] In that regard, the court will, in most cases look at the testimony of the pathologist, an expert as well as an independent witness, who would have the material evidence pertaining to the injury that was inflicted on the person of the deceased. It was a stab wound which he had found at the abdomen of the deceased, when he did the post-mortem. The purpose of looking at his

evidence must necessarily be with a view of ascertaining the cause of the death of the deceased. It is significant in that it would provide a linkage between the fatal injury and the accused person, if at all. If the factual circumstance has been established that the fatal injury was caused by the accused person, the nature of the fatal injury, as was diagnosed by the pathologist, would go, in assisting the court in determining, to a great extent, the factum of intention on the part of the accused person, in the absence of direct evidence admitting to the guilt.

[18] Applying the test in *Tham Kai Yau*'s case (*supra*) to the circumstances in this case, we were of the view that the injury inflicted by the first appellant on the deceased, although only a single stab, it was the most probable cause of the death of the deceased, as indeed it had turned out to be. This was amply demonstrated in the testimony of the pathologist, SP9. In such a case, it is murder, an offence under s. 302 of the Penal Code, as opposed to a lesser offence of culpable homicide not amounting to murder. This was in fact the conclusion of the learned trial judge. With respect, the learned trial judge did not err in so concluding and in sustaining the charge of murder against the first appellant. As such, we found no merit in the argument that was advanced by learned counsel for the first appellant in that regard.

Common Intention

[19] As for the second appellant, the defence counsel had raised the issue of common intention under s. 34 of the Penal Code, which he contended was not applicable to the factual circumstances of this case. There is no evidence that the act of stabbing was pre-planned. The second appellant did not see the act of stabbing done by the first appellant. There was also no evidence that the second appellant knew that the first appellant was carrying a knife with him.

[20] We reproduce s. 34 of the Penal Code for ease of reference. It reads as follows:

> Each of several persons liable for an act done by all, in like manner as if done by him alone.
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> 34. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[21] The notion behind this provision as contained under s. 34 of the Penal Code has been a subject of much deliberation both, by the numerous learned judges in their reported decisions as well as by learned commentators in their authoritative books, on the subject of common intention and what it entails.

[22] In the case of *Mahboob Shah v. Emperor* AIR [1945] PC 118 the Law Lords in the Privy Council had this to say when dealing with an appeal where s. 34 of the Penal Code was invoked, in aid by the prosecution: " …To

A invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any of the persons in the same manner as if the act were done by him alone". Their Lordships then went on to state the need to
B establish that there was a pre-arranged plan among all of the accused persons to commit the crime. Once that is established, then any act by any of them is done in furtherance of their common intention. The act would translate into the execution of the common intention.

[23] In the case of *Khairul Edam Adam & Anor v. PP* [1999] 2 SLR 57 it was
C ruled that "...the plan could develop on the spot. What was enquired was a meeting of the minds or acting in concert."

[24] The learned authors of Ratanlal and Dhirajlal on *The Indian Penal Code* 34th edn. p. 51 have this to say on the workings of s. 34 of the Penal Code:

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> The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. It must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same
E manner as if the act were done by him alone.

[25] As such, to our mind, once common intention is shown to exist, thereby connoting a pre-arranged plan among the accused persons, then, any act however small done by any one of them, as long as it is done in furtherance of a common intention, he is liable for the offence, as if the
F offence is committed by him alone. That is the process under s. 34 of the Penal Code in order to determine liability of persons acting in furtherance of a common intention. The issue of whether an accused person is a primary or a secondary participant on account of his degree of participation in the commission of the offence does not, with respect, arise at all in such
G determination. All of them are equally as guilty as long as they contribute acts which are done in furtherance of their common intention. In that regard, it must be reiterated that common intention has been established to have existed among them. Once that pre-condition is fulfilled, then any act done by any of them in furtherance of that common intention, is deemed as
H 'shared' among them. If at all, the different degrees of participation among the accused persons may be considered by the court, in passing sentence, if they are found guilty and are convicted by the court. In other words, it may be relevant in mitigation. But in terms of attaching liability, a consideration of the degree of participation by the various accused persons in the commission of the offence, with respect, ought not to happen.

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[26] Applying this principle underlying s. 34 of the Penal Code to the evidence in the appeal before us, we were of the respectful view that the prosecution had failed to adduce direct evidence nor circumstantial evidence that could be used as a basis to link the second appellant to the act of killing of the deceased on that fateful night. Although common intention may be formed immediately before the commission of the impugned act, there was no evidence led by the prosecution from which such an inference may be concluded against the second appellant to the effect that she, together with the first appellant had committed the offence of murder in pursuance of a common intention of them both. We could find no evidence of any act that was done by the second appellant that was done in furtherance of a common intention of them both.

[27] We had occasion to refer to that part of the learned trial judge's grounds of judgment where, at p. 38 he had said:

> Walaupun perbuatan menikam si mati telah dilakukan oleh T1, akan tetapi T2 seolah-olah tidak menghirau atau melarang T1 daripada bertindak sedemikian, malahan T2 tidak pun merasa terkejut apabila melihat keadaan si mati yang berlumuran darah. Ini semua adalah satu keadaan di mana satu kesimpulan boleh diambil bahawa kedua-dua mereka mempunyai niat bersama untuk melakukan rompakan dan semasa rompakan telah melakukan pembunuhan terhadap si mati.

[28] With due respect, we were of the view that nothing much could be read into it in the context of proving s. 34 of the Penal Code on the part of the second appellant. To our mind, that did not fulfil the requirement to establish common intention. At the highest, the second appellant saw the stabbing. But there was no evidence to show what act she had done in the direction leading to the murder of the deceased. More crucially, where was the common intention between the first and the second appellants to commit murder. It must be recalled that the second appellant had no knowledge that the first appellant had carried with him a knife. If there was such an evidence then perhaps such an inference may be drawn, although we must quickly hasten to add here that such an inference may not be readily made against the second appellant, in the absence of any other incriminating evidence that could be attributable to her.

[29] Premised on the above, it was our respectful view that in the absence of a common intention to commit murder, the second appellant was not guilty of the murder charge under s. 302 of the Penal Code. In fact, learned Miss Deputy was candid and frank enough to admit that there was no such evidence against the second appellant, in the course of her submissions before us.

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Decision Of This Court

[30] In the upshot, we had dismissed the appeal of the first appellant against his conviction for murder. We had also allowed the appeal of the second appellant against her conviction for murder on the basis that the prosecution had failed to show evidence that she had done act(s), which had the effect of furthering a common intention of them both, to commit the murder of the deceased. We had therefore acquitted and discharged her of that murder charge against her. We had affirmed the conviction for murder against the first appellant. His death sentence by hanging by the learned trial judge was also affirmed by us.

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[31] We had so ordered accordingly.

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